No. 89-790

Supreme Court, U.S.
FILED
NOV 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARJORIE A. EIMANN, *et al.*,
Petitioners

v.

SOLDIER OF FORTUNE MAGAZINE, INC., *et al.*,
Respondents

On Writ of Certiorari from the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review, in a diversity case, the Court of Appeals' reading of Texas law on torts.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The statement of the case by the Court of Appeals is entirely fair and sufficient to the purpose, and we will not repeat it here. We emphasize only a few points:

(a) The gentleman who placed the ad, Hearn, had no prior criminal record, gave his correct name, address and telephone number in the letter accompanying the ad, met all of the qualifications in the ad, and testified that he had no criminal purpose in placing the ad. Therefore, an investigation of him by SOF would have produced nothing, and, in fact, petitioners conceded below that they were not asserting a duty on the part of SOF, before publishing, to investigate the ad in any way.

(b) The ad itself had a lawful meaning and sought lawful services. Petitioners' expert at trial attempted a

construct of "code" words that he hoped would reveal hidden meanings in the ad, and he had to abandon the project; he could not make it work.

(c) The first contact as a result of the ad between Hearn and the murdered woman's husband, Black, did not concern a crime but a job. After a number of calls, the subject of conversation turned to Black's gun collection. It was *three months* after the first call before Black even "hinted" about a murder, and it was *five months* before Black finally made up his mind to perform the deed. A perfectly legitimate response to the ad turned into a crime after an entire sequence of intervening events.

(d) The jury did not find that the ad was an invitation to crime. The court's instruction asked whether the ad was "related to criminal activity" and whether SOF knew or should have known from the face "or the context" of the ad that it could reasonably be interpreted as an offer to engage in illegal activity. "Relate to" was never defined, and "context" was defined as including "the nature of the magazine, its other advertisements and articles, the nature of its readership, and the magazine's knowledge, if any, that other advertisements in the magazine could reasonably be interpreted as an offer to engage in illegal activity."

REASONS FOR DENYING THE WRIT

The Questions Presented pose no federal issues. No constitutional or statutory provision is referred to. Each question, even if answered in the affirmative, would not properly involve this Court's jurisdiction.[1]

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[1] The reference to the Seventh Amendment on the last page of the petition, Pet. 19, is not part of the Questions Presented and for a good reason: it was not raised in the Court of Appeals and thus comes too late. In any event, the Court of Appeals did not reverse a factual finding by the jury but instead ruled that, under Texas law, the ad on its face placed no duty on SOF not to publish.

The Questions Presented aside, the court below did not decide a federal question.

The brief for Soldier of Fortune ("SOF") in the Court of Appeals was essentially divided into two sections—one presenting purely state law questions, such as duty, standard of care, proximate cause, intervening circumstances, and the like,[2] and the other presenting First Amendment issues.

SOF's counsel began his argument in the Fifth Circuit by stating that while the case posed serious First Amendment questions, the court need not reach them.

And the court did not. It began its opinion by noting that petitioners "presented this case as a straightforward negligence action * * *," and the court then stated: "We need not address SOF's first amendment attacks on the judgment to resolve this appeal." App. 8a (footnote deleted). Again, after detailing some of SOF's First Amendment claims in a footnote, the court concluded, "We need not confront these issues * * *." App. 8a n.1.

The Court of Appeals, relying on six Texas cases and two treatises on torts, found as a matter of state law that "SOF owed no duty to refrain from publishing a facially innocuous classified advertisement * * *." App. 8a-9a. Again, after citing "Texas law", App. 9a, and what "Texas courts" have ruled, App. 10a, the Fifth Circuit concluded that "* * * SOF did not violate the required standard of conduct * * *." App. 8a.

The reason why some of this Court's commercial speech cases were mentioned was carefully set forth by the Fifth Circuit: "While *we do not reach SOF's first-amendment arguments*, the Supreme Court's recognition of limited first amendment protection for commercial speech nonetheless highlights the important role of such communication for purposes of risk-benefit analysis." App. 14a

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[2] SOF cited to and relied upon 25 Texas cases in its brief on appeal.

(emphasis added). In other words, the importance of commercial speech, as spelled out by this Court, was part of the "Balancing the Burdens and Risks" undertaken by the Fifth Circuit in applying Texas law. App. 17a.[3]

What petitioners really object to is the Fifth Circuit's interpretation of Texas law ("* * * the analysis employed did not reflect views held by Texas courts," Pet. 11). While, of course, this Court has the constitutional power to oversee a Court of Appeals' interpretation of state law in a diversity case such as this one, there is no need for such an extraordinary use of its powers here. Not only would the Court reach the same result as a matter of Texas law, but even if it did not, it would surely conclude on First Amendment grounds that the judgment below must be affirmed.[4]

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[3] The court's interpretation of Texas law was entirely consistent with that in other States. In fact, in other States this case would not even have gone to trial but would have been decided by dismissal or summary judgment. *See, e.g., Yuhas* v. *Mudge*, 129 N.J. Super. 207, 322 A.2d 824 (App. Div. 1974) (publisher has no duty to investigate advertised dangerous products; summary judgment affirmed); *Walters* v. *Seventeen Magazine, Inc.*, 195 Cal.3d 1119, 241 Cal. Rptr. 101 (Ct. App. 1987) (same; dismissal affirmed); *Pittman* v. *Dow Jones & Co.*, 662 F. Supp. 921, 923 (E.D. La.) (no duty to investigate fraudulent ad; summary judgment), *aff'd*, 834 F.2d 1171 (5th Cir. 1987).

[4] For example, this Court would never countenance a jury being allowed to judge a single advertisement by reference to the publisher's "readership", those who attended its conventions, its articles and photographs, and even its editorials, as this jury was allowed to do. Nor would this Court allow a jury to single out this particular, controversial magazine for damages when petitioners' own expert and their counsel conceded that the same advertisement in other periodicals would not result in liability. This is precisely the type of content-directed restriction on speech that this Court has repeatedly struck down. *E.g., Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987); *Regan* v. *Time, Inc.*, 468 U.S. 641 (1984); *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95, 98-99 (1972); *Carey* v. *Brown*, 447 U.S. 455, 462-463 and n.7 (1980).

CONCLUSION

For each of these reasons, the petition should be denied.

Respectfully submitted,

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